Washington University Law Review

Volume 1956 | Issue 1

1956

Courts and the Churches in Missouri: A Survey of Missouri Law on Intra-Church Disputes with Reference to the Political Theory of the Pluralists

Joseph O. Losos
Missouri Bar Association

COURTS AND THE CHURCHES IN MISSOURI: A SURVEY OF MISSOURI LAW ON INTRA-CHURCH DISPUTES WITH REFERENCE TO THE POLITICAL THEORY OF THE PLURALISTS

JOSEPH O. LOSOS†

In September 1954 the St. Louis Court of Appeals handed down a decision in the case of *Mertz v. Schaeffer*.[1] This case arose out of the bitter disputes in the Missouri Lutheran community that developed after the Missouri Synod of the Lutheran Church proclaimed a Common Confession which differed in certain respects from the dogmas of the national church. The confession was issued in 1950; the following year, in a meeting held at the Trinity Lutheran Church, a minority of the members of that church discountenanced the newly proclaimed confession and expressed their support of the orthodox beliefs. Several more meetings were held during the summer, all marked by minority attendance, and at one of those meetings the minority group voted to leave the Missouri Synod. Early in December a majority of the total church membership appeared at a regular meeting and endeavored to undo the purported secession, but they were locked out of the church. The majority then held a meeting outside the church and voted to rejoin the Missouri Synod; they were at a disadvantage in their subsequent efforts to actually control the church premises, however, because the regular pastor supported the minority. Thereupon they brought suit to enjoin the minority from interfering with their use and control of the church property.

The court of appeals, in a decision by Commissioner Wolfe, upheld the majority. The court based its opinion upon a finding that the meeting in December expressed the valid determination of the opinion of the church membership. The court said that since the December gathering was a regular meeting (or would have been had it been permitted to meet regularly), with a majority in attendance, and since majority rule was the established system in the church, the court should defer to the majority. The court also declared, however, that it would not permit a change in the beliefs of the church from one religion to another even by a majority, but conceded that it would interfere to prevent this only if such a shift were fundamental. Here, the court said, the differences between the ideas of the disputing parties were infinitesimal.

---

† Member of the Missouri Bar.

1. 271 S.W.2d 238 (Mo. App. 1954).

This opinion was short and logically fluent, but it nevertheless presented many of the problems of a subject both intrinsically complex and consitutionally perplexing. The questions of judicial adjudication of actions arising out of intra-church quarrels have troubled Missouri courts since shortly after the Civil War, but a whole new focus has recently been added by the decision of the United States Supreme Court in *Kedroff v. St. Nicholas Cathedral.*[2] It will be the purpose of this article to consider the relation of Missouri law to the *Kedroff* decision, and the relation of both to the political thought of what is known as the philosophy of pluralism. Finally, I shall try to suggest some criteria to be applied in this area, using Missouri as an example.

The problem of judicial interference in intra-church disputes first arose in Missouri in the 1860's. During the Civil War the Presbyterian Church took an increasingly active stand in support of the Northern cause. The edicts of the General Assembly of the church denouncing slavery and applauding the federal government naturally annoyed the pro-Southern communicants, and the latter drew up a vigorous protest known as "The Declaration and Testimony." This in turn impelled the General Assembly to denounce the declaration and, when the pro-Southern group remained firm, to order those who still supported the declaration position to be dropped from the rolls of the Presbyterian Church. This action was denounced as illegal by those who were removed inasmuch as it was, they contended, unjustified by any fault on their part. The trustees of Lindenwood College in St. Charles (a Presbyterian Church school) were members of the ousted group. The state administration, which was then Republican, brought a quo warranto action against these trustees, alleging that they no longer had a right to sit as the representatives of the Presbyterian Church. The case, *State ex rel. Watson v. Farris,*[3] reached the Missouri Supreme Court in 1869. Judge Wagner, whose position on the court was a result of a kind of court-packing by the Republican administration,[4] decided for the plaintiff and refused to allow the members of the ousted group to serve as trustees. The court said that the church's General Assembly had determined who had the right to be a Presbyterian, and that since the highest authority of the Presbyterian Church had decided that the incumbent trustees were no longer in good standing, the court could not hold that they were. The pro-Southern group was labelled as secessionist, and thus the religious dispute in Missouri was treated as a microcosm of the political controversy which had split the nation.

2. 344 U.S. 94 (1952).
3. 45 Mo. 183 (1869).
4. BARCLAY, THE LIBERAL REPUBLICAN MOVEMENT IN MISSOURI 1865-1871, at 21 (1926).

The matter was not at an end, however. The decision applied in its terms, of course, only to Lindenwood College. A dispute over the control of the First Presbyterian Church of St. Charles reached the supreme court a few years later, and this case, *Watson v. Garvin*,[5] was decided for the pro-Southern group. Judge Bliss approached the problem as one which concerned only a local church group, thus distinguishing the *Farris* case where the entire Presbyterian Church was interested in the management of Lindenwood College. The court reasoned that there was an independent right of property in the local church deriving from the form in which the property was held—"in trust for the congregation of the First Presbyterian Church of St. Charles"—and from the rights of local congregations recognized by church doctrine. Judge Bliss drew a distinction between excommunication and the action of the General Assembly in dropping the names of the pro-Southern group from the rolls. Because the pro-Southern group had not been excommunicated, it followed that there was no question of their being Presbyterians. Since they were the majority of the congregation, they had the right to control the church property. This was especially true, Judge Bliss thought, in light of the summary method by which the group had been treated by the General Assembly.

Before the *Garvin* decision was printed in the reports, the United States Supreme Court decided the famous case of *Watson v. Jones*.[6] This case arose in Kentucky out of circumstances very similar to those in several previous Kentucky cases. The case was heard in the federal court because of diversity of citizenship and, inasmuch as *Erie R.R. v. Tompkins*[7] had not yet been decided, the Supreme Court, speaking through Justice Miller, held that the Kentucky decisions in favor of the pro-Southern group were irrelevant to the determination of this case. The rationale of the Supreme Court was based upon an inquiry into the jurisdiction of the court. It was held that the civil courts could not upset a decision by the highest tribunal of the church upon a question within its jurisdiction. To Justice Miller, "jurisdiction" meant the authority to decide certain types of disputes. For example, an ecclesiastical court could not sentence a man to death or imprisonment, but it could decide religious controversies. Thus, in the *Jones* case, the civil courts could not inquire whether the General Assembly had a right, pursuant to the customs and usages of the church, to take a stand on the issue of slavery and make this a religious doctrine. The court recognized a right in the church, a right grounded in the tradition of religious freedom, to interpret its own laws.

5. 54 Mo. 353 (1873).
6. 80 U.S. (13 Wall.) 679 (1871).
7. 304 U.S. 64 (1938).

When this decision was announced the anti-Southern group in the Presbyterian Church asked for a rehearing in the *Garvin* case. The rehearing was granted, but the original decision was sustained.[8] This time the Missouri Supreme Court, in an opinion by Judge Adams, took a more uncompromising position. The statement that the Southern supporters were still Presbyterians was again emphasized. This led to a puzzling suggestion that if the pro-Southern group had been excommunicated they would have lost their rights but, having been merely dropped from the rolls, they retained control of the local church despite their bad standing with the national organization. Therefore, following the original decision, they still had a property right in the St. Charles church building and other assets. But this was only used as a secondary argument. The principal reason given for the decision was that the Presbyterian Church had broken its own rules by taking up a political issue. This rationale involved, of course, a direct attack on the Supreme Court's decision in *Watson v. Jones* and, more specifically, upon Justice Miller's concept of jurisdiction. Judge Adams disagreed strongly with that opinion, and this disagreement extended to its premises as well as to its result. Judge Adams agreed with Justice Miller that the only reason that courts do not interfere with ecclesiastical decisions is a lack of jurisdiction, but Judge Adams used the term jurisdiction in the narrowest sense: a lack of an issue justiciable in the courts of the land. Where there is property, there are property rights, and it is the duty of the courts to determine these rights. The courts should review any action of the ecclesiastical body with reference to these property rights. It was said to be against the internal Presbyterian law for the church to interfere in matters of state; actions taken pursuant to such interference would be void.

These decisions reflect the beliefs and emotions of the Civil War and the slavery struggle, but they also indicate much of the logic of the respective philosophies regarding the church-state relationship. Justice Miller and Judge Wagner thought in terms of the jurisdiction of the church court, and they thought this jurisdiction extended widely over church affairs and was final within its own province. Judge Adams thought in terms of the jurisdiction of civil courts, and reached the conclusion that the courts should determine all property matters. While it is true that Judge Wagner, in the *Farris* case, mentioned that civil courts must determine property matters, it is obvious that this meant to him merely that the state must settle the matter formally by providing the authoritative forum. Thus, under this interpretation, the Missouri courts would be in much the same position

8. Watson v. Garvin, 54 Mo. 353, 369-85 (1873).

in cases involving intra-church disputes as they would be in hearing a case arising out of a tort committed in Kansas. The hearing of the case, the jurisdiction over the subject matter, does not mean that the Missouri courts can render a decision based upon an independent interpretation of Kansas law. Similarly, the civil courts would have to defer to church authority. This facet of the question of jurisdiction was considered more explicitly in some later cases.[9]

Another approach, besides the concept of jurisdiction, was introduced by Justice Miller in *Watson v. Jones*.[10] He divided the cases involving intra-church disputes before the civil courts into three categories: (1) cases where the civil courts must interpret a trust; (2) cases concerning churches governed in a congregational fashion; and (3) cases concerning churches organized on a hierarchial basis. It was his purpose to restrict the first category to instances where specific trust purposes were clearly set forth in the trust instrument. In these cases the civil courts would have to make an adjudication just as they would in any trust problem. In the second category, the civil court should defer to the congregation; likewise in the third, the ruling of the church should be controlling. The first expression of an antithetical viewpoint in Missouri can be seen in *Watson v. Garvin*,[11] where it is suggested that the St. Charles congregation had a special status merely because its members were technically the beneficiaries of the deed of the property. Justice Miller would not have considered this a trust problem since specific trust purposes were not set forth in the deed. The distinction in the two cases is thus based, in part, upon how broadly or how narrowly Justice Miller's trust category is interpreted.

These fundamental questions were not presented in so sharp a focus in less agitated times. The problems were still extant, however. In a case involving a dispute between the pastor and the elders of the Christian Church of Neeper, the Missouri Supreme Court, in *Prickett v. Wells*,[12] held that, according to church usage, the elders were to decide who had the right to be pastor. The court used language regarding the necessity for a judicial determination of property rights, but all that was done, as a matter of fact, was to find that the elders and not the pastor held the authority in the church. In *Russie v. Brazzell*[13] the same court had a knottier problem. In 1885 the General Conference of the United Brethren of Christ had voted to amend their constitution and draw up a confession of faith. In 1889 the confession and amendments had been submitted to the membership of the church in accordance with the church constitution, which provided that all

9. See text at p. 80 *infra*.
10. See note 6 *supra*.
11. See note 5 *supra*.
12. 117 Mo. 502, 24 S.W. 52 (1893).
13. 128 Mo. 93, 30 S.W. 526 (1895).

constitutional changes had to be ratified by two-thirds of the membership. The changes had carried by about 50,000 votes to 3,000, out of a total of over 200,000 church members; and the highest tribunal of the church had held that two-thirds of those voting was a sufficient majority. A quarrel then developed in the Eaglesville Church of the United Brethren of Christ between a faction accepting the new confession and a faction opposed to it. As in the great majority of cases, the legal title to the church property was held in trust for the congregation,[14] and Judge McFarlane deemed it essential to determine whether the changes had resulted in a breach of trust. The court carefully inspected the changes and decided that they were not fundamental, and did not cause a loss of the church's doctrinal identity. The court then went on to determine that whether the constitution had been properly amended was a question on which the church tribunal's decision was final. Thus, on this point the court deferred to the interpretation of church law by a church tribunal, but on the more important question of church doctrine there was no such language of deference.

The development of the broad interpretation of the "trust" category was continued in *Fulbright v. Higginbotham.*[15] As a result of a clash over doctrinal differences, the church deacons of the Pleasant Hill Baptist Church brought an action to enjoin the defendant trustee and a minority of the membership of the church from interfering with the church property. Judge McFarlane, relying on the language in *Prickett v. Wells*[16] and his own opinion in *Russie v. Brazzell,*[17] proceeded along the established line of reasoning that since the issue concerned the rights of the parties with regard to property which was held under a deed of trust, the state had to decide the matter just as it would any other trust. The court granted the injunction, however, without actually considering any question of church doctrine, on the technical ground that no breach of trust was alleged.

The trend toward a broad interpretation of the trust category was somewhat checked in *Turpin v. Bagby,*[18] again decided by Judge McFarlane. The property in question had been conveyed in trust to be "used, kept, maintained and disposed of as a place of divine worship for the use of the Ash Grove Baptist Church."[19] There was no doubt that the constituted government of the church was rightfully running the church; the only issue was a bald one of doctrine. It was

14. Since Chambers v. St. Louis, 29 Mo. 543 (1860), charitable trusts had been unquestionably valid, so the trust method of holding property was common.
15. 133 Mo. 668, 34 S.W. 875 (1896).
16. See note 12 *supra.*
17. See note 13 *supra.*
18. 138 Mo. 7, 39 S.W. 455 (1897).
19. *Id.* at 9, 39 S.W. at 456.

quite clear that a decision in this case to inspect the beliefs of the parties would involve the courts in considering every doctrinal disagreement that arose in any church organized on a trust basis, and the court refused to interfere.

But the deviation represented by the *Turpin* case seemed only a temporary aberration when the decision in *Boyles v. Roberts*[20] was announced. The opinion in that case has been the high-water mark of intervention by civil courts into church affairs in the history of Missouri law to the present time. The opinion by Judge Graves is a long, energetic, and frequently masterful display of Erastian logic, reinforced by an emotion which occasionally rises to the surface. The juridical tempest which it set off resulted in the most thorough consideration of the central issues of church-state problems in Missouri legal history.

The case arose from the effort of the Cumberland Presbyterian Church to merge with the Presbyterian Church in the United States of America. The Cumberland Church had split off from the parent church early in the nineteenth century because of the advocacy of a program of revivalism and anti-determinism by the founders of the new church. Later, a difference in attitude toward negro membership developed when the Cumberland Church espoused a negro-exclusion policy. The main issue, however, was that of free will versus determinism, and the principal *raison d'être* of the Cumberland Presbyterian Church was its desire to modify the inflexibility of traditional Calvinism which had dominated the parent church. As the century progressed, traditional Calvinism became less and less important in Presbyterianism, and merger plans were considered. Soon after the turn of the century, definite plans were agreed upon between the two denominations. To facilitate the merger, the Presbyterians amended their Confession of Faith in 1903, and at the same time issued an explanation of other portions of the confession. Thereafter, a formal merger was instituted and approved by a majority of the presbyteries of both groups.

The Cumberland Presbyterian Church at Warrensburg was under the control of a group attacking this merger, and the dispute came before the court in the form of a bill to enjoin the dissenting group at Warrensburg from interfering in any way with the control of the church property by the pro-merger group. The injunction was denied. The opening portion of the opinion emphasized the difference between property matters and ecclesiastical matters, stating that the freedom of the church in the latter category was unimpaired. Thus, said Judge Graves, "a deposed minister or an excommunicated member of a

20. 222 Mo. 613, 121 S.W. 805 (1909).

church cannot appeal to the civil courts for redress."[21] It was made clear, however, that the helplessness of such a person would be due merely to a lack of a claim for specific relief. If he could establish the loss of a property right recognized by the courts, he would have a redress. The line of cases from *Prickett v. Wells* through *Russie v. Brazzell* and *Fulbright v. Higginbotham*[22] were cited to show that when property rights are involved the civil courts must decide the issue.

Because there was a dispute over the control of church property, the court felt justified in considering the question of whether there was sufficient identity between the two church doctrines to permit a merger. The vigor of Judge Graves' espousal of a broad trust category can best be demonstrated by quoting a paragraph from the opinion:

> That there must be identity of doctrines and faith before a majority of a church organization can take the church property into another church is fully recognized. . . . That in case of a division in a church organization, that portion of the organization, whether the majority or the minority, which adheres to the existing creed, doctrines and faith at the time of the dispute, is entitled to the church property, is unquestioned law.[23]

Judge Graves made an inspection of the doctrines of the respective churches similar to that in the *Russie* case,[24] but far more searching. His conclusion was that the dissimilarity was so great that a merger would be prejudicial to the rights of the minority. While admitting that the doctrine of the Cumberland Church could have been changed by the members in conformance with their constitution, the court pointed out that this procedure was not followed. The claim of the plaintiffs that the merger was authorized under a clause in the church constitution permitting the absorption of other faiths was indignantly dismissed as an illogical interpretation. Judge Graves realized that Justice Miller's ideas in *Watson v. Jones* were diametrically opposite to his own, and that the latter's broad concepts of church freedom from state supervision were inimical to the legal system he was advocating. Significantly, he referred with praise several times to the British case of *Free Church of Scotland v. Overtoun*,[25] which had already become something of a *cause célèbre* throughout the common-law world as an extraordinary exercise of civil authority to enforce a rather strict trust upon a religious organization whose principles had undergone change.

---

21. *Id.* at 644, 121 S.W. at 810.
22. See text supported by notes 12-15 *supra.*
23. 222 Mo. at 656, 121 S.W. at 814.
24. See note 13 *supra.*
25. [1904] A.C. 515. See the discussion of this case in text at note 86 *infra.*

A very long dissent was written by Judge Woodson. The restrictions on the rights of the church's General Assembly, and particularly the narrow reading of the absorption clause were protested. Judge Woodson recognized that the crucial question was that of identity of doctrine, and he noted that there were many more cases supporting his position than that of the majority. His opinion, however, primarily emphasized the relation of this case to the broader questions of religious freedom. Under his view, when the self-government of the church is invaded, when a minority within the church gain the upper hand because the civil courts agree with their opinions as to the fundamentals of the ecclesiastical polity, the rights of the majority to religious freedom are infringed. Nor must the group loyal to the decisions of the church government be a majority. The import of the dissent is clear—when any man who adheres to the laws of the church as they are interpreted by the responsibile authority in the church is prevented by the civil courts from enjoying the control those laws give him, he is at least deprived of property rights. Judge Woodson speculated on the question of what the courts would do in interpreting the dogmas of a church whose only rules were those of the Bible. Would they set themselves up as biblical exegetes? He thought that to suggest this showed the degree of state control the majority opinion would introduce. Judge Lamm dissented also, in a much lighter vein, deploring the *furor scribendi* and remarking that the decision had the net result of precluding any hope of Christian unity.

On a motion for rehearing, the decision in *Boyles v. Roberts* was upheld in a short and very confusing opinion by Chief Judge Valliant.[26] During the course of this opinion the Chief Judge remarked that "it may be conceded that the judgment of the Church court declaring the meaning of the Church dogmas is conclusive on all the members of that Church, but it is not conclusive on those who are not members."[27] This language, of course, undercut the whole basis of Judge Graves' opinion, and has been quoted since in direct contravention of the rationale of the main opinion.

As a result of the *Boyles* case it might have seemed that Missouri would follow England in announcing a policy of state control of intrachurch affairs. In actual effect, however, Judge Graves claimed too much. The scope of civil control he advocated was apparently too strong a dose; it is a fact, however, that of the many courts that considered the validity of the Cumberland-Presbyterian merger, only Missouri and Tennessee declared it void.[28]

26. 222 Mo. at 691, 121 S.W. at 826.
27. *Id.* at 695, 121 S.W. at 827.
28. See Barkley v. Hayes, 208 Fed. 319, 321 (W.D. Mo. 1913); 8 U. Mo. BULL. L. SER. 24 (1915).

In 1913 a question of merger similar to that in *Boyles v. Roberts* came before a federal court in Missouri in a bill to quiet title to the property of a great number of churches. The court, in *Barkley v. Hayes*,[29] reasoned that the logic of *Watson v. Jones*[30] applied, that the effectuation of this merger was within the powers of the church's General Assembly, and that, if questions of identity of faith were important (which it did not concede) there was a sufficient identity. It concluded its rather short opinion with the statement that under the doctrine of *Swift v. Tyson*[31] and *Kuhn v. Fairmont Coal Co.*[32] a federal court need not accept state law as binding, so that *Boyles v. Roberts* was treated as irrelevant.

In the year following the *Barkley* case the Missouri Supreme Court refused to uphold the *Boyles* decision. The case, *Hayes v. Manning*,[33] came before the court in a suit for possession of a Cumberland Presbyterian Church in Marshall, Missouri. The decision was written by Judge Walker, who had not been on the court at the time of the decision in *Boyles v. Roberts*. The portion of the *Boyles* opinion which dealt with the power of the assemblies of the two churches to arrange the merger was criticized. In the *Boyles* case, Judge Graves had taken a very narrow view of the church's power to alter the *status quo*. Judge Walker, on the other hand, emphasized the breadth of powers needed to carry out all the tasks of the church. These tasks were not construed to comprise only the most obvious ones. Whereas Judge Graves could not conceive that the provision permitting absorption of other denominations could be stretched to sanction a merger, Judge Walker thought this only common sense. Presbyterian Churches were governed on the representative system, and representative bodies had to be given power to implement the wishes of their constituents. If this was a matter that required the vote of the membership, the requirement was fulfilled in this case, Judge Walker thought, by the adoption of the merger by the presbyteries. On this point Judge Graves' opinion had been weakest, for he conceded to the membership the right, if constitutionally exercised, to change the doctrines of the church. If that was so, why was this not just a case of a doctrinal modification? And of course the rigid concept of theological purity which Judge Graves advanced was inconsistent with the provision for absorption.

Judge Walker also took direct issue with the "identity of doctrines" criterion established by Judge Graves. He quoted the language in the *Boyles* rehearing and reaffirmed the language of *State*

29. 208 Fed. 319 (W.D. Mo. 1913).
30. See note 6 *supra*.
31. 41 U.S. (16 Pet.) 1 (1842).
32. 215 U.S. 349 (1910).
33. 263 Mo. 1, 172 S.W. 897 (1914).

ex rel. Watson v. Farris.[34] His opinion marked, in effect, the triumph of Judge Woodson's dissenting opinion in the *Boyles* case. As in that dissent, issue was taken not only with the reasoning of the majority in the *Boyles* case, but also with the inarticulate major premise behind the decision. Judge Walker posited a religious freedom which he considered basic, a freedom whose extents were pernicious to Judge Graves. Judge Walker took pains to eulogize the opinions of Justice Miller, which Judge Graves had so recently deprecated.

Judge Graves dissented, of course, referring once again to the *Prickett, Russie* and *Fulbright* cases. He dissented alone however; the defeat was complete. The next year a note in the *University of Missouri Bulletin Law Series*[35] indicated that the course of the law on the subject had clearly shifted, approved the change, and remarked that the vital question in these matters had been changed from that of identity of doctrine to that of continuity of organization.

A decision in the St. Louis Court of Appeals in 1909 contributed to this trend. *Klix v. Polish Roman Catholic St. Stanislaus Parish*[36] involved a dispute between the parish priest and a group of parishioners over the management of the parish's parochial school. The parishioners wanted the authority to elect the directors of the corporation which held title to the church property. The Roman Catholic bishop of St. Louis had formerly held the title, but had conveyed it to a religious corporation which was composed of six members of the congregation. In fact, however, the property had still been controlled by the priest and the bishop after incorporation. The court held for the priest and concluded that when the bishop held the title he had not held it as trustee for the congregation in any strict sense, but rather he had held it for the "church," and that the incorporation did not change the situation. The deed to the corporation listed the corporation itself as the *cestui que* trust, and the court considered the real beneficiary to be a religious body governed in the Roman Catholic tradition, and not a state-imposed democratic body. It specifically remarked that it was not the purpose of Missouri law to convert hierarchical and synodical church governments into congregational ones. The *Klix* case was followed in a somewhat different context in *Second Baptist Church v. Beecham,*[37] where the Springfield Court of Appeals held that incorporation did not take away previously exercised control by the congregation.

Of course, in cases clearly within the area of trust interpretation the civil courts still assumed the task of determining whether there

34. See note 3 *supra.*
35. 8 U. Mo. BULL. L. SER. 24 (1915).
36. 137 Mo. App. 347, 118 S.W. 1171 (1909).
37. 180 S.W. 1065 (Mo. App. 1915).

had been a breach of trust. In 1912, Judge Lamm, in the course of interpreting a rather definite deed of conveyance, held in *Strother v. Barrow*[38] that it was not a breach of trust for one congregation to merge into another, thus guarding the flanks, so to speak, of *Hayes v. Manning*.[39] In the more famous case of *Mott v. Morris*[40] Judge Lamm found a breach of trust in the abandonment of a church building.

On the other hand, the limits of state control were reasserted in a Kansas City Court of Appeals case, *State ex rel. Hynes v. Holy Roman Apostolic Catholic Church*.[41] This case involved the excommunication of a Catholic priest, a situation which had usually been considered as creating no right of action in the person excommunicated. The court so held here, reasoning that the loss of salary created no contract right which the civil courts could protect.

A similar case arose in the St. Louis Court of Appeals in 1939 in *Olear v. Haniak*.[42] In the intervening quarter-century since the *Hynes* case comparatively little litigation on intra-church matters had reached the Missouri courts. Shortly before the Second World War, the number of cases suddenly increased, probably because of a stronger movement for church mergers. In the *Olear* case a group of parishioners of a Ruthenian (Roman) Catholic Church in St. Louis sought to remove their priest, who was Ukrainian and therefore unpopular with many of the Ruthenian parishioners. The court remarked that ecclesiastical questions belong to ecclesiastical tribunals, citing *Boyles v. Roberts*.[43] However, the church had rules giving the congregation a much wider control over affairs than was usual for Catholic Churches, and the plaintiffs claimed that a right to control the church property was involved. The court adroitly observed that the plaintiffs had not exhausted all their remedies in the church hierarchy, and that furthermore *Hayes v. Manning*[44] had established the rule that the church organization (here the organization of the Roman Catholic Church) was the final judge of ecclesiastical issues even in matters involving property, except in special circumstances.

Further support was given to church autonomy in *Clevenger v. McAfee*.[45] The Kansas City Court of Appeals, using the *Fulbright* case[46] as authority for the rule that force cannot be used by those who are trying to unseat the governing group, granted the trustees of church property an injunction against a minority group within the

38. 246 Mo. 241, 151 S.W. 960 (1912).
39. See note 33 *supra*.
40. 249 Mo. 137, 155 S.W. 434 (1913).
41. 183 Mo. App. 190, 170 S.W. 396 (1914).
42. 235 Mo. App. 249, 131 S.W.2d 375 (1939).
43. See note 20 *supra*.
44. See note 33 *supra*.
45. 237 Mo. App. 1077, 170 S.W.2d 424 (1943).
46. See note 15 *supra*.

church. The process of lawful control was marked as a property matter to be controlled by the civil courts. The emphasis on church autonomy was again shown by the Kansas City court in *Stone v. Bogue.*[47] The dispute arose in the Hedrickite branch of the Mormon Church over the validity of "five messages" declared by the Twelve Apostles of the church to be divine. The only real issue in the dispute was whether there had been coercion at an open meeting of the membership, and the only indication of violence that the court found was that an important member of one faction weighed 185 pounds. This was held to be insufficient evidence of coercion. In the course of the opinion, after the customary language about the distinction between ecclesiastical and property matters, the court went on to remark that the actual property value involved was small, that there was no real estate, and that, therefore, the internal church decisions should be given great weight. This kind of realism, although rare in these cases, demonstrates a consistency with the rationale of *Hayes v. Manning,*[48] and tends to diminish the importance of the property test as a basis for judicial determination of church matters.

In 1944 a significant decision was handed down in a federal district court in Missouri. *Smith v. Board of Pensions of the Methodist Church, Inc.,*[49] decided by Judge Hulen, involved the status of the pension fund for retired ministers of the Methodist Episcopal Church, South, after a merger had taken place with two other Methodist Episcopal groups. A group of ministers from the southern church claimed a distinct property right in the pension fund as of the day of merger. *Erie R.R. v. Tompkins*[50] had ended the liberty which the federal courts had exercised in the days of *Barkley v. Hayes,*[51] but *Hayes v. Manning* had also intervened, and the result was quite consistent with the earlier federal case. Judge Hulen decided for the defendant church by holding that there had been no diversion of the trust when ministers of the other churches were included in the plan. If identity of faith were the criterion, as the *Boyles* case insisted, there was certainly sufficient identity here, inasmuch as there was no doctrinal issue. But, above all, Judge Hulen emphasized that the property issue was incidental to the ecclesiastical one, and that *Hayes v. Manning* had definitely set the law of Missouri on a course favorable to the settlement of church problems by church bodies. His approval of the *Hayes* decision was made manifest by his quotation of Acts 18: 14-15, and his parallel statement that the American courts should follow the

47. 238 Mo. App. 392, 181 S.W.2d 187 (1944).
48. See note 33 *supra.*
49. 54 F. Supp. 224 (E.D. Mo. 1944).
50. See note 7 *supra.*
51. See note 29 *supra.*

Roman example and not meddle with what does not concern them.[52] Judge Hulen, like Judge Walker, thought that the mere existence of property matters should not cause the civil courts to make decisions on church issues, and the similarity of the problems in the two cases especially led him to follow the result and logic of *Hayes v. Manning*.

But not all church problems reached the civil courts in the same form, and it was essential to vary the treatment as the problem differed. A good example of such variation appeared in the case of *Briscoe v. Williams*.[53] This was a suit by officers and members of the Corinthian Mission Baptist Church to enjoin the defendant from acting as pastor. The St. Louis Court of Appeals declared that it had no jurisdiction over purely religious matters, but it went on to take up the question of whether the group which ousted the defendant pastor had authority to do so. The court found that the meeting had been called on one day's notice, that it had been conducted very irregularly, and that the defendant had not been given a chance to meet the charges against him; consequently, the injunction was denied. It can be seen that an important ambiguity is presented which the opinion does not fully answer. Is the court determining the law of the church, or is it merely deciding whether the church meeting had jurisdiction to decide the question? In all cases involving congregational churches this problem exists. The distinction is admittedly fine, but its importance is great nonetheless, for if the civil courts have free rein to interpret the church law the trend of opinion will turn again toward *Boyles v. Roberts*.[54] On the other hand, a mere search for jurisdiction will restrain the scope of the court's inquiry to the determination of whether the body purporting to make a decision has the right to do so, and not whether they have made a proper decision. The court appeared to take up the question of authority when it indicated that the church assembly had no power whatsoever to take the steps they took and that a meeting irregularly called had no more authority than a meeting of strangers. On the other hand, the reference made by the court to the church's rules of procedure, suggests a more active role on the part of the court. To some extent the court was clearly supervising the rules of the church, although this may have been subordinate to its main job of investigating the credentials of the meeting.

A retreat from the more advanced positions of non-intervention seemed to be taking place. Two years before the *Briscoe* case the

52. 54 F. Supp. at 236-37. Acts 18: 14-15 read:
14. And when Paul was now about to open his mouth, Gallio said unto the Jews, If it were a matter of wrong or wicked lewdness, O ye Jews, reason would that I should bear with you.
15. But if it be a question of words and names, and of your law, look ye to it; for I will be no judge of such matters.

53. 192 S.W.2d 643 (Mo. App. 1946).

54. See note 20 *supra*.

Kansas City court, in deciding *Marr v. Galbraith*,[55] had reverted to a broad interpretation of the trust category in an adjudication of a dispute over ownership of the proceeds of a fire insurance policy covering the Walnut Grove Methodist Church. The church property was held under a deed of trust listing the ministers and congregation as beneficiaries. The deed was the standard one used by the Methodist Church nationally and it appeared that the grantor used the trust primarily to facilitate the making of a gift and not to create a true trust, yet the court held that the congregation could disregard the wishes of the constituted church authority. The result was a return to the logic of *Boyles v. Roberts*[56] and *Watson v. Garvin*.[57]

A less distinct intervention in church authority was displayed in 1946 by the Kansas City Court of Appeals in *Trett v. Lambeth*.[58] A dispute had broken out in the Center Grove Baptist Church in Howell City between a group desiring to remain within the loose Baptist convention and a group known as the "Land Marks" who denounced all compromises with simon-pure congregationalism and wanted to withdraw from the convention. In a meeting at which about fifty people were present, it was decided by a vote of ten to none that the church should leave the convention. Thereafter the group favoring withdrawal ran the church and constantly endeavoured, the court found, to exclude their opponents from the church. Six months later another meeting was held, and a number of the leading opponents of the Land Marks were expelled from the church. The ousted group sued to enjoin their adversaries from interfering with their use and enjoyment of church property. The court followed *Briscoe v. Williams* and looked to the propriety of the meetings, deciding that the meeting which had expelled the opponents of the Land Mark group was highly improper. The court also doubted that many of those who had taken over the control of the church at the first meeting were then bona fide members of the church. The same problems that existed in the *Briscoe* case were evident here.

The following year another Baptist dispute came before the St. Louis Court of Appeals. The case of *Longmeyer v. Payne*[59] arose when a number of the members of a Hannibal Baptist Church who had been ousted from the church sued to enjoin the preacher and other members of the congregation from controlling the church property. The dispute centered on the issue of whether certain members who had not been allowed to vote on the question of ouster because of their non-attendance at meetings or non-payment of dues had been unjusti-

55. 238 Mo. App. 497, 184 S.W.2d 190 (1944).
56. See note 20 *supra*.
57. See note 5 *supra*.
58. 195 S.W.2d 524 (Mo. App. 1946).
59. 205 S.W.2d 263 (Mo. App. 1947).

fiably denied the privilege. The court, in an opinion by Commissioner Wolfe, after repeating the usual statements about the finality of ecclesiastical decisions on doctrinal matters, stated that the main question concerned the makeup of the meeting. This, the court realized, was the purest case of jurisdiction, for the problem came down to deciding whether the members had an enforceable privilege to vote; and since there was no higher religious tribunal to decide the dispute, either the members themselves must decide whether they could vote, or the civil courts would have to decide. Commissioner Wolfe held that under church law such disenfranchisement was irregular, and held for the plaintiffs on the theory that the meeting was improperly constituted.

In 1947 the Missouri Supreme Court, in *Ervin v. Davis*,[60] weakened the force of the broad interpretation of the trust category in *Marr v. Galbraith*.[61] This case involved the enforcement of a trust where the language of the deed was very similar to the language in the customary deeds of title of the Methodist Church, the grantee. The court held that no charitable trust was created; however, the case was somewhat special since the alleged *cestuis que* trust were the preachers, and the Constitution of 1865, in effect when the breach of trust allegedly occurred, forbade trusts for the benefit of ministers. This case could technically be said to have been decided on this ground, although the opinion did reflect an unwillingness to renew the search for religious trusts.

The *Marr* case was cited by the Springfield Court of Appeals three years later in *Murr v. Maxwell*.[62] The court accepted the doctrine that the form of ownership of the property would not determine the amount of supervision of internal affairs which the civil courts would exercise. The plaintiffs claimed that the defendants' efforts to "exclude" them from the Rock Springs Free Will Church were against church law and thus void. The court reached the conclusion that expulsion was purely a religious matter, and that the plaintiffs could not complain to the state courts. In short, the court held that where the organization which makes the decision is unquestionably clothed with the appropriate power, the mode by which their decision is reached is not to be examined.

Considered thus, the case of *Murr v. Maxwell* is consistent with the cases of *Briscoe v. Williams*, *Trett v. Lambeth*, and *Longmeyer v. Payne*. Not merely consistent but, it is submitted, if viewed with an eye to a grand plan, they are quite harmonious. The state courts will not go into theological questions, they will not guarantee a due process

60. 355 Mo. 951, 199 S.W.2d 366 (1947).
61. See note 55 *supra*.
62. 232 S.W.2d 219 (Mo. App. 1950).

by the church bodies (except perhaps in a very extreme case), but they will of necessity inquire whether the decision-making body had any right to make the decision and whether in making a decision it was acting freely. The problems which arise in determining these matters are not always easy to solve, and the issues raised in *Mertz v. Schaeffer*[63] indicate that the formulation of syllogisms cannot answer all problems.

Moreover, a new variable was introduced by the decision of the United States Supreme Court in *Kedroff v. St. Nicholas Cathedral.*[64] This case arose out of a dispute over the control of the St. Nicholas Cathedral in New York. There was no theological difference between the two parties; the conflict was between a group desiring the traditional control of the church by Moscow and a group supporting the autonomy which developed in many of the Russian Orthodox churches in America following the Russian Revolution. In 1945 the New York legislature had passed an act establishing the right of the autonomous churches to the church property in the State of New York. The New York Court of Appeals held, both as a matter of common law and of statutory law, that the group representing the autonomous churches had the right to the cathedral.[65] The United States Supreme Court reversed the decision, holding that the New York statute interfered with the petitioner's exercise of religious freedom in violation of the fourteenth amendment.

The Court's opinion treated the state court's decision as having been based solely on the statute. Justice Reed, speaking for the majority, denied that the powers conceded to legislatures in *American Communications Ass'n, CIO v. Douds*[66] could be extended to sanction a legislative finding that the ecclesiastical authorities in Moscow were subject to the domination of Communist Russia. He distinguished the *Douds* case on the basis that the privilege of resorting to the NLRB could be denied to those striving to disrupt commerce for political purposes, while in *Kedroff* he thought the courts were dealing with a a constitutionally protected right of religious freedom. The case of *Latter-Day Saints v. United States*[67] was also distinguished on the ground that it concerned forfeiture of property rights for illegal practices, a totally different situation from that present in the *Kedroff* case. Justice Reed concluded by stating that church rule is supreme "even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues. . . ."[68]

63. See note 1 *supra.*
64. 344 U.S. 94 (1952).
65. St. Nicholas Cathedral v. Kedroff, 302 N.Y. 1, 96 N.E.2d 56 (1950).
66. 339 U.S. 382 (1950).
67. 136 U.S. 1 (1890).
68. 344 U.S. at 120-21.

Justice Frankfurter concurred, emphasizing that legislative determination of church disputes was a violation of the fourteenth amendment. Justices Black and Douglas also concurred, reiterating their belief that the fourteenth amendment incorporates the Bill of Rights.

It is not possible to say with certainty how wide the area of constitutional protection has been extended by this decision. At least one point is reasonably definite: legislative enactments settling intra-church disputes are not likely to be upheld. It is easy to see why legislative action should be considered the strongest case for constitutional checks. Justice Frankfurter in his concurring opinion referred to the *Kulturkampf* of the 1870's, in which Bismarck sought to sever the control of Rome over German Catholics. It is far easier for a Bismarck to arise in the executive or legislative branches of government than in the judicial; the customary safeguards against judicial overassertions are usually far stronger than in other branches of government, since, as Justice Holmes remarked, judges customarily make law in the interstices. While it is true that as late as the seventeenth century the prevalent idea was that the legislature's principal duty was to "find" the law,[69] nevertheless, if there is any definitive contribution of the great movement of eighteenth century thought that culminated in our Constitution, it is the relegation of lawmaking to the legislature and of interpretation to the judiciary. There are, of course, great questions on this point in respect to the position of judges, but the precept that legislatures do not decide cases has been generally accepted, and for them to do so in an area as sensitive as that in the *Kedroff* case would be particularly offensive.

It is interesting that Justice Jackson did not agree with this last point. Dissenting alone, he commented that the rule of separation of powers is not a command of the fourteenth amendment. He classified the problem as one within the state-supervised areas of trust enforcement and property right adjudication. The Russian Orthodox Church was incorporated in New York, and the state had reserved a power of control in every charter of incorporation. The action of the State of New York, Justice Jackson contended, was an exercise of that power. The fact that legislatures could ignore the wishes of the church or its members without restraint did not trouble him, and this is easy to see if the premises of his opinion are accepted. For, as in the case of Judge Graves in *Boyles v. Roberts*,[70] an outlook which places emphasis on property aspects or on trust considerations will ignore, or at least minimize, the whole complex of issues a church-

69. See McIlwain, The High Court of Parliament and its Supremacy (1910).

70. See note 20 *supra*.

centered analysis produces; and these issues represented to many, including Justices Miller and Reed, the very key to the matter.

This decision has a fairly narrow ambit, however, if it is concerned only with legislative enactments—an interpretation placed on it by the New York Court of Appeals when the case was remanded.[71] The court of appeals upheld its earlier decision, this time placing the entire weight of the opinion on common-law grounds. To date, few other courts have had occasion to interpret the *Kedroff* case.[72]

If this is all the case signifies there is presumably little current relevance to Missouri law. Missouri has been happily free from the plethora of legislative pronouncements of this class in recent years, but a very interesting case of this type did come up in the post-Civil War years in Missouri. This was the famous case of *Missouri v. Cummings*,[73] which arose out of the loyalty oath established by the Republican administration in Missouri about the time of the close of the Civil War. A Catholic priest was indicted for preaching without having taken the broadly-phrased oath. The Missouri Supreme Court, through Judge Wagner, held that no problem of freedom of religion was involved. If Pennsylvania could pass a Lord's Day Act, Missouri could surely pass such a bill as this, the court reasoned. The court also decided that the oath did not violate the *ex post facto* clause of the Federal Constitution. Instead of the broad scope of church autonomy which he had permitted in *State ex rel. Watson v. Farris*,[74] Judge Wagner took a very narrow view of the rights of churches in the *Cummings* case. To Judge Wagner, at any rate, the legislature could constitutionally establish rules which would be bad common law for the judges to make. Of course, the political convenience of both decisions should not be overlooked; it was probably not a coincidence that both decisions favored the Northern cause.

When the case went to the Supreme Court of the United States, the argument for Cummings was placed largely on the *ex post facto* clause and the prohibition against bills of attainder, since the case arose before passage of the fourteenth amendment, not to mention the recent development toward reading the terms of the first amendment into the fourteenth. Cummings' attorney, Reverdy Johnson, did argue, however, that while the first amendment does not apply to the states, "it announces a great principle of American liberty. . . . It is almost inconceivable that in this civilized day the doctrines contained in

71. St. Nicholas Cathedral v. Kedroff, 306 N.Y. 38, 114 N.E.2d 197 (1953).
72. Romanian Orthodox Missionary Episcopate v. Trutza, 205 F.2d 107 (6th Cir. 1953); Ginassi v. Samatos, 3 Ill. App. 2d 514, 123 N.E.2d 104 (1954); Trustees of Methodist Church v. Methodist Church of Greenland, 98 N.H. 498, 104 A.2d 204 (1954).
73. 36 Mo. 263 (1865), *rev'd*, 71 U.S. (4 Wall.) 277 (1866).
74. See note 3 *supra*.

this constitution should be considered as within the legitimate sphere of human power."[75] Today it is established doctrine that it is beyond the legitimate sphere of state power to enforce a law respecting an establishment of religion or the free exercise thereof. But exactly what does this doctrine mean?

It would seem from Justice Reed's opinion in the *Kedroff* case that this doctrine means state action, in any form, inconsistent with the theory of *Watson v. Jones*.[76] Freedom to select the clergy and the "church's choice of its own hierarchy" are explicitly stated by Justice Reed in the *Kedroff* case to be rights which the states cannot infringe. If *Watson v. Jones* is now constitutional law, as has been suggested,[77] then a whole strand of Missouri law presumably is retrospectively unconstitutional.[78] This is a bold step to take, and it is not clear that it is really the effect of the decision. The New York Court of Appeals obviously did not think it was when it decided the *Kedroff* case on remand. The Supreme Court spent a considerable amount of time dealing with statutory enactments and legislative power, more time perhaps than would be necessary if this case were basically concerned with all forms of state control. Yet, at several places Justice Reed does seem to be dealing with the case as though it were more than a question of legislative power. At the end of the opinion he declares:

> Ours is a government which by the "law of its being" allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.[79]

The question arises as to what is the nature of the right that the Supreme Court is protecting in *Kedroff*. Justice Reed referred to the problem of interference with the free exercise of religion many times, while he used the language of separation of church and state only once. The latter concept is very awkward in these matters, for the courts must decide these cases and in favoring one side or the other an issue of establishment seems to be forcing the English language. Liberty is a more appealing concept and, although the entire first

75. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 313 (1866).
76. See note 6 *supra*.
77. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 110 (1953).
78. See Boyles v. Roberts, 222 Mo. 613, 121 S.W. 805 (1909); Fulbright v. Higginbotham, 133 Mo. 668, 34 S.W. 875 (1896); Watson v. Garvin, 54 Mo. 353 (1873).
79. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 120-21 (1952) (The footnotes in the quoted material have been omitted.).

amendment is now in effect incorporated into the fourteenth,[80] the portions on liberty are more easily consonant with the terms of the fourteenth amendment.

Whose liberty is being protected? When Justice Reed talks about the church's choice of its clergy, of its control over its own government, is he giving the church rights *qua* church? If so, is this not inconsistent with *Hague v. CIO*[81] and other cases which have set down the rule that only natural persons have a right to liberty under the fourteenth amendment? Perhaps the *Kedroff* case marks a breach in that rule, a breach which writes into constitutional law the philosophy of the pluralist political theorists.

There can be no doubt that the writings of these theorists are relevant to problems discussed herein; so many of them were written in direct response to actual cases dealing with this very problem of state control over intra-church matters. Any consideration of the law as it ought to be should take into account a movement which, although brief in the years of its popularity, has certainly been one of the most thought-provoking in the history of modern Western political theory. It is not often that political thought and private law come so close; if there is any advantage in the cross-fertilization of the social sciences, in the consideration of practice against the background of theory, and vice versa, this area may be almost ideal for such a comparison.

Pluralism, as it is known today, originated with the German historian, Otto von Gierke, who lived in the period of the Hohenzollern Empire. Gierke was a medievalist with the customary reverence for the spirit of the Middle Ages, and he viewed that spirit as one marked by the abundance of groups and the group-mindedness of the people. Men thought of earthly associations as, at best, imperfect copies of a divine order, and the guilds and communes could only strive to imitate the *societas perfecta*. Each group, as well as each person, had its place in the great chain of being which was visualized. Gierke found this group spirit to be particularly strong in Germany, and most effective at the time of the Conciliar movement, in the early fifteenth century. After that, Roman Law swept through Germany, and the rise of the nation-state broke down barriers between the individual and the state. After the death of Althusius, the German thinker of the early seventeenth century whom Gierke rescued from obscurity, these ideas were submerged by the state and the ideological advocates of the state and of individualism.

A portion of Gierke's great work on these subjects, *Political*

80. Cantwell v. Connecticut, 310 U.S. 296 (1940). *But cf.* PFEFFER, CHURCH, STATE, AND FREEDOM 250 (1953).
81. 307 U.S. 496 (1939).

Theories of the Middle Ages, was translated into English in 1900 by the noted legal historian, F. W. Maitland.[82] Maitland contributed a preface which is one of the few essays of that genre which have really proved to be important in the history of ideas. In the course of outlining Gierke's ideas and insights he added numerous discussions of English examples and, of the highest importance, a practical modern setting to the theories. He remarked how the institution of the trust, with its flexibility and capacity to circumvent unpleasant legal restrictions, had served as a shield to permit self-government by many groups. The Masons were permitted their local rules when Lord Eldon fortunately thought of the Middle Temple, and having survived his stern gaze, the autonomy of groups had been established in fact, if not in theory. It was the theory, Maitland remarked, that was unrealistic and harsh; the facts had, to the great good fortune of Englishmen, proved wonderfully supple. In fact, he commented, "it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf. . . ."[83] The jurist was Hegel, but behind Hegel stood the developments of many centuries. The claims of the papacy in the Middle Ages, and the countervailing assertions of the Holy Roman Empire, reinforced by the Roman Law, planted the seeds of authoritarianism which Bodin, Hobbes, and others cultivated. Then, in the years of the Enlightenment, the opposing seeds of individualism grew, until the two were crossed in the French Revolution and the thoughts of Rousseau. The individual and the state were the two poles, and between them stood nothing. Dicey had already shown the importance of one of the greatest enactments of that philosophy, the Chapelier Law of 1791.[84] The nominalism of Bentham and Spencer and the idealism of Hegel intellectually ruled the nineteenth century. Maitland believed that the age of Darwin, the age of the survival of the fittest, required a more fluid conception of society in which concepts would not freeze out actualities.

In 1904, in his essay *Moral Personality and Legal Personality,*[85] Maitland quoted Dicey's remark that facts, not legal fictions, make a corporation something different from its individual members. He again deplored the nineteenth century penchant for transmuting all relationships into contractual form and ignoring group realities. Unless groups were treated as something more than an artificial

82. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Maitland transl. 1927).

83. *Id.* at ix.

84. DICEY, LAW AND PUBLIC OPINION IN ENGLAND 467 (2d ed. 1914). See *id.* at 153-58.

85. Maitland, *Moral Personality and Legal Personality,* in 3 COLLECTED PAPERS 304 (1911).

entity composed only of human entities and nothing more, blunders would be made.

From this point of view, a blunder had been made by the House of Lords in that very year, 1904, in the case of *Free Church of Scotland v. Overtoun.*[86] This case concerned a proposed merger between the Free Church of Scotland and the English Presbyterian Church which was resisted by a minority of the membership of the Scottish church on the grounds that the merger represented a deviation from the fundamental faith of the church and was therefore a breach of trust. Although the great majority of the members of both churches desired the merger, and despite the fact that the Free Church had come into being in protest against state control, the House of Lords held that the handful that followed what the Lords believed to be the original doctrine of the church could control the church and successfully prevent the merger. The trust device had changed from a servant to a master.

This decision was patently unrealistic; Parliament had to provide for the effectuation of the merger.[87] But it did much to justify the ideas of Maitland and Gierke. It confirmed the pluralistic beliefs of a scholar and high church clergyman, John Neville Figgis, who published in 1914 one of the most telling works of the pluralist movement. The book, *Churches in the Modern State,* was not only an able presentation of the case for ecclesiastical self-government, it was also a *cri de coeur.* Figgis rejected the concept of the church which had guided the House of Lords in the *Overtoun* case, the concept of a church bound by the faiths of its founders, a legal being whose documents were to be treated like ordinary contracts. The church was not merely a creature of the state but had a life of its own. To treat the church as if it were the product of, say, the Companies Act of 1862, was idiocy. As a matter of fact, all societies were something more than a collection of human beings. Voluntary societies of all kinds had a life to live apart from the sufferance of the state. As Figgis stated, "it is, in a word, a real life and personality which those bodies are forced to claim, which we believe that they possess by the nature of the case, and not by the arbitrary grant of the sovereign."[88] If the test was the involvement of the individual, who could not produce associations and corporations capable of commanding loyalty very much like patriotism? "The relations between a member and his society are more akin to those of a citizen to a State than to anything in the individual,"[89] he observed. Indeed, it is possible in

86. See note 25 *supra.*
87. 1 DUGDALE, ARTHUR JAMES BALFOUR 210 (1937).
88. FIGGIS, CHURCHES IN THE MODERN STATE 42 (1914).
89. *Id.* at 69.

comparing Maitland with Figgis to note in the ideas of the latter a slight intensification of the role of voluntary societies. Autonomy of the group in respect to the state begins to take on more and more of the character of competition with the state; the actual, quasi-sovereign quality of these groups, intimated by Maitland, is developed by Figgis. With Figgis, however, the state is still supreme. In a somewhat ambiguous passage which has presented critics with some difficulties, he admitted that in talking about these voluntary organizations "the higher their object, the greater danger there is of their outstepping the bounds of justice in their desire to promote it; and the greater need therefore of government regulation and control."[90] Two concepts can be seen developing. One is the limited concept of the group as a real person; the other is the broader concept of the group as a lesser governing authority. The former, which was Maitland's main, although not his sole, point, admits of government overlordship, but the latter affords the state far less power, and has potentialities of pushing it aside altogether.

Figgis saw that his arguments applied to all groups, but he prized the rights of churches primarily. The aim of churches was the highest good, and their claim on their members would, or perhaps should, if their members conducted themselves as they ought, be correspondingly high. This sense of devotion infused much of Figgis' *Churches in the Modern State,* tending at times to emotionalize his arguments. But it had the virtue of making his examples more concrete, and it unquestionably supplied him with a moral zest which, for better or for worse, supplied the special quality of much of his ideology. Yet that ideology could be divorced from its ecclesiastical base to a large extent, and the force of his arguments could be applied to a wider area, even if it were desirable to understand their special significance for churches. It is a fact that churches have a special status in the American (and to a perhaps lesser degree, English) mind.[91] Figgis always held in mind the religious aspects of the matter; one of the arguments he used for church self-rule was the possibility that this would raise the moral standards of the churches and tend to keep out secular time-servers. One of his chief arguments for pluralism was that men live much of their lives and develop much of their capacities in groups, and it may be surmised that he was thinking particularly of churches. He hoped for the emancipation of all groups striving for the good life, and he would have been less the devout Anglican that he was if he had not pictured churches, and especially his church, in the vanguard.

This enthusiasm for groups was not, of course, universally held, and

90. *Id.* at 102.
91. Foreword by Howe, *The Supreme Court, 1952 Term,* 67 HARV. L. REV. 91, 94 (1953).

even sympathetic critics shied at the emphasis Figgis placed on the life of these societies. A. D. Lindsay, in a review of *Churches in the Modern State*,[92] complained of the effort to erase the distinction between real and artificial persons. Lindsay considered that Figgis, in ignoring this obvious factual distinction, weakened his case for realism in judging social arrangements. Lindsay did not believe that this oversight destroyed the force of the book, for beyond the personification of the group was the deprecation of the state. The state had been called upon to justify itself, Lindsay noted, and he reviewed what he thought were the three reasons given for its primacy: its power to coerce, its ethical role, and its comprehensiveness. He admitted that the third had particularly strong cogency, for the state could accomplish more varied tasks than any other group, but he contended that this did not establish a qualitative difference between the state and other bodies. Maitland's immeasurable gulf between the state and the individual was being rapidly bridged.

The English intellectual atmosphere of 1913—the period of Tory near-insubordination over Ulster, of Irish rebelliousness, of syndicalist agitation among the workers, and even violent suffragette excitement—was not conducive to a marked state-consciousness. Whatever it might have led to, we do not know, for the First World War shortly intervened. Even a few months before the war began Ernest Barker prophesied that "if it comes to a pinch, we shall forget we are anything but citizens."[93] The accuracy of that prediction had the effect of minimizing the intellectual turbulence of the years just preceding the war.

Yet one must remember that there were thinkers who needed no "pinch" to remind them of their allegiance. The attention given here to pluralism is not designed to disguise the power of opposing currents of thought. In the seventeenth century John Selden had said:

> Divines ought to doe no more then what the State permitts. . . . Nothing better expresses the condition of the Christians in those times [before Constantine] then one of those meetings you have in London of men of the same Country . . . they [the state] gave the Church as much or as little as they pleased. . . .[94]

This was a very understandable reaction to the power of the churches of that day and the zeal of their advocates. The dread of the church acting as a state was demonstrated as late as 1851, in the Ecclesiastical Titles Bill.[95] While the fear of organized religion had declined, respect for the charismatic quality of the churches had declined also. The

92. Political Quarterly, Feb. 1914, pp. 128, 212.
93. Political Quarterly, Feb. 1915, p. 101.
94. TABLE TALK OF JOHN SELDEN 101 (Pollock ed. 1927). See STEPHEN, LIBERTY, EQUALITY, FRATERNITY 114-33 (1874).
95. Ecclesiastical Titles Assumption, 14 & 15 VICT. 419, c. 60 (1851).

state was still vastly more powerful; it could give the church as much or as little as it pleased, and the same applied to its treatment of other organizations. As Justice Holmes wrote, "Admit what personality you like to the other groups inside of or overlapping the State—what of it? Man certainly is a personality but the Sovereign kills him when it sees fit and can."[96] Figgis had challenged the sovereign, but he had not dethroned it.

The most expansive assertations of group rights were to be made by a much younger man, however, who was the recipient of the letter in which Justice Holmes made the comment quoted above. Harold Laski, although an atheist, believed (in the years 1915-21 at least) in the rights of voluntary societies as strongly as Figgis. In his case the trade unions took the place of the church, but his ideology involved a defense of the group *qua* group. The main contours of pluralistic thinking had been already laid out, but Laski plowed deeper. The concept of the group challenging the state's monopoly on sovereignty had been developed in the works of Maitland and Figgis. Under Laski it reached its most complete form. In *The Problem of Sovereignty* he classified the state as "a will to some extent competing with other wills. . . ."[97] Elsewhere he remarked of the state that, "men belong to it; but, also, they belong to other groups, and a competition for allegiance is continually possible."[98] The growth from the thought of Maitland is obvious. Maitland had suggested that in the "age of Darwin" the state might be thought to be somewhat like another, stronger group, and Laski embraced that concept and that metaphor. The state was to compete with other groups, in a Darwinian fashion, for the loyalty of the people, and if the other groups won, it must be that the state was no longer fit to be supreme. That competition was conceived as being waged to convince the people, as buyers of sovereignty, that they would receive the most beneficial experience from the group they chose. The business of unions and corporations, as well as the state, was the highest good for their members. The state, placed on this level, could hardly claim a naturally superior position; it must prove its authority. Laski was not entirely consistent in this position. At times, like Figgis, he spoke in terms of group autonomy as well as group competition. But what he principally added to Figgis' views was, not new ideas, but an extension of logic which converted organizations from their status of merely possessing lives of their own to a position tending to threaten even the life of the state. Perhaps this was but a difference in emphasis but surely Laski's assertions were bolder than Figgis', and while the latter

96. 1 HOLMES-LASKI LETTERS 8 (Howe ed. 1953).
97. LASKI, THE PROBLEMS OF SOVEREIGNTY 14 (1917).
98 Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 425 (1916).

tended to think of the *Overtoun* decision as a mistake, Laski felt it to be an outrage. Of course, Laski admitted the state had authority over property relations, but the rights of groups (and he definitely thought of the matter as involving rights) came first.

He did not, however, conceive of these rights as existing in a vacuum. Just as the state existed to help achieve the good life for its members, so did voluntary groups; and one of the principal arguments for the possession by the latter of independent "lives" was the opportunity such a concept afforded for not only a development, but an enrichment of the lives of their members. Laski welcomed Duguit's conception of the state as a service-providing organism,[99] with the attending implied limitations on the state's omnipotence. Laski tended, without stressing the point, to consider groups in the same light.

This would seem to demonstrate a more individualistic emphasis in Laski's pluralism than has heretofore been expressed but, of course, consistency was never his forte, and within a few years his pluralist inclinations had vanished, leaving only a residue to be incorporated in his Marxist class ideology. Pluralism, as an active philosophy of state, has not been an important force since Laski. This does not mean, however, that it has completely vanished. There were, of course, many more adherents and elements in its diffuse ranks than have been even tangentially covered in these pages, and some of these have continued since the First World War. The Gierke-Figgis outlook, with its medieval emphasis, was naturally welcome to the Catholic Church, and bore some resemblance to the corporatist thought which paralleled pluralism on the continent and which became distorted into Fascism. In its Catholic form this approach still has vigor, and within the last ten years an American Jesuit publication, *The Jurist,* has combined this concept with the philosophy of *Watson v. Jones*[100] to construct a theory of jurisdiction which at least would make church internal self-government a constitutionally protected right (anticipating *Kedroff*), and at most would give churches control over marriages of church members and in general restore the churches to a quasi-medieval status.[101] The potentialities of converting groups into little states is implicit in pluralism, and particularly so in the thinking of Laski. This possibility always has been minimized in English thought but, particularly when mixed with communalistic ideas, the opportunities for its growth are great. In South Africa today, certain Nationalist thinkers consider

99. Duguit, *The Law and the State,* 31 HARV. L. REV. 1, 185 (1917).

100. See note 6 *supra.*

101. K. R. O'Brien and D. E. O'Brien, *Freedom of Religion in Restatement of Inter-Church-and-State Common Law,* 6 JURIST 503 (1946); K. R. O'Brien and D. E. O'Brien, *Restatement of Inter-Church-and-State Common Law,* 5 JURIST 73 (1945).

one of the possibilities of *apartheid* to be a kind of pluralism, a race syndicalism.

In this country the similarities between pluralism and federalism are most apparent. In 1917 Laski commented that in America, "the classic home of federalism, nowhere is there ground more fertile for such seed as M. Duguit has sown."[102] There is indisputably a strong national tradition of distribution of power, of distrust of omnipotence. Perhaps this has entered into our treatment of church problems. In 1906 a writer remarked that the recent *Overtoun* case was the British way, while *Watson v. Jones* was the American way, of handling intra-church disputes—a tribute, he believed, to our pattern of law.[103] Very recently, Professor Paul Freund has reminded us that a federalist is at least something of a pluralist.[104] This is not an American insight; the influence on Figgis of Lord Acton, an advocate of federalism and certainly a pluralist of sorts, indicates another side of the pluralist tradition.

Yet it may be questioned how far pluralistic beliefs have become a part of our political inheritance. Certainly recent interventions by the state into areas of society formerly considered immune from governmental control indicate that in time of stress the autonomy of the group is not so highly regarded. But perhaps the law has absorbed more pluralistic ideas than one might think. Certain ideas, such as a greater respect for the viability of corporations and unions, have come into the law in the last generation. Some jurists have been more influenced than others; Professor Chafee has even gone so far as to comment on the desirability of considering "the state itself as just one more kind of association."[105] Not many lawyers agree with that concept, but the less radical pluralist concept of the group as a person has more support. It has, in fact, been espoused by the Supreme Court, at least to some extent.

It is Professor Howe's position that the *Kedroff* decision follows the pluralist tradition in treating the group as a person.[106] When Justice Reed's words are considered in a literal sense, it would seem that this is so. This would not be so revolutionary. Although the *Hague* case expresses the general rule that only real persons have a right to liberty, there have been exceptions to that rule. Professor Hale[107] has

---

102. Note, 31 HARV. L. REV. 186, 191 (1917).
103. Peck, *American versus British Ecclesiastical Law*, 15 YALE L.J. 225 (1906).
104. 10 PERSPECTIVES USA 9 (1954).
105. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1029 (1930).
106. Foreword by Howe, *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91 (1953).
107. Hale, *Some Basic Constitutional Rights of Economic Significance*, 51 COLUM. L. REV. 271, 311 (1951).

pointed out that the cases of *Grosjean v. American Press Co.*[108] and *Bridges v. California*[109] grant to publishing companies the right to invoke the constitutional objections against infringement of freedom of the press. The reason is clear: if only individuals can claim these rights a great amount of suppression may be permitted. So it may be argued in *Kedroff*, for unless the church has something like a right, constitutional safeguards will be lost and religion will be controlled by the state. Of course, in the past, individuals have been the parties to the lawsuit. Is that merely a technicality? If the individual must invoke the claims of the church to have a constitutional right, it is really the liberty of the church that is being protected. It is submitted, however, that it is also possible to look at the problem in another way. The parties raising the issue of the fourteenth amendment may have rights as members of the church. The right of the church to decide its own affairs is the right of each member to facilitate his worship by controlling the property incident to that worship, and any member can claim a violation of his own right by the invasion of the church's self-government. If the church rules provide for a system other than majority rule, the fact that a majority are against the party raising the issue is irrelevant; the minority retains the right. In a completely hierarchical church, one member may assert such a right against all the others.

This interpretation avoids the complex and confusing potentialities of the more pluralistic one. It may be asked what immediate practical consequences this entails, and the answer would be that there are few. Perhaps in the very unusual case where all the members of a non-congregational church act in defiance of church rules this interpretation would mean that the rules could be ignored, since no one could raise the point. It would certainly mean that the right protected in the *Kedroff* case would be that of the American churchgoers loyal to the Moscow leadership, and not the right of the Moscow leadership itself.

But the less immediate results are by far the more important. If the somewhat doctrinaire idea of the church as a person is not accepted, much less the more extreme thoughts of the pluralists, each case can be considered more flexibly as a problem in itself. When one thinks of these problems as examples of conflicts of individual wills, then the particular needs of the individuals involved, the difficulties of exceptional cases, and the nuances of different churches can be more readily treated. The real problem in the *Kedroff* case was the ambiguous position of the Russian Orthodox Church leadership living under the authority of a totalitarian atheist state. It may materially differ whether one approaches this question from the standpoint of church rights, or

108. 297 U.S. 233 (1936).
109. 314 U.S. 252 (1941).

from the standpoint of the interests of the members, that is, the interests of the members in a very long range sense, for we must look to their interests as Selden and Locke looked to the interests of a man condemned to be hanged. He does not consent now, but he consented previously to a rule of law which carried this penalty and he cannot now revoke his acceptance. This does not mean that very exceptional situations may not make other determinations desirable, as in the *Kedroff* case.

This interpretation is not meant to imply that the *Kedroff* decision is wrong. Surely, a state legislature's *ipse dixit* must be considered with great suspicion; if an enactment by the majority of a legislature provides, for example, that judicial notice must be taken of a fact which is very difficult to prove, grave impairments of our liberties may take place. The pitfalls inherent in the *Douds* decision are becoming increasingly clear; it has been pointed out that the *Kedroff* decision is valid only as an indication of a less serious situation, not sufficient to warrant legislative intervention, than that in *Douds*.[110] If this is so, it is a seriously thin safeguard, a demonstration of the tendencies inherent in the liberal dogma of the 1930's in regard to judicial power.[111] Professor Howe suggests that this problem should not be treated as a unity, but rather that *Kedroff* should be construed as giving religious liberties a more preferred position than others.[112] It is not the place here to go into the argument about preferred liberties and rights; that religion has some special status is accepted by many commentators. This does not directly involve the question of pluralism, although, as Professor Howe points out, it would indicate a philosophy Figgis could accept, if not Laski.[113] Whether or not the doctrine of *Kedroff* is limited to religious cases, it does grant to churches, or members thereof, a definite right against interference by legislatures, and perhaps courts.

It is possible to reject the pluralistic version and still consider the *Kedroff* opinion as going beyond the New York Court of Appeals interpretation.[114] Absent a very pressing reason, decisions of a civil court determining the religious tenets of a faith, or the rules of church government, contrary to the decisions of the church body which has a right to decide these matters might be considered a violation of the

110. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 109 (1953).

111. This was foreshadowed by Judge Wagner's opinion in Missouri v. Cummings, 36 Mo. 263 (1865), *rev'd*, 71 U.S. (4 Wall.) 277 (1866), where he concluded with a declaration of the value of judicial deference to the legislature which reads as if it had been written in the 1940's.

112. Foreword by Howe, *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 92-93 (1953).

113. *Id.* at 93.

114. See text supported by note 71 *supra*.

rights of any member who wished to abide by the results of the church decision. Of course, this means that the crucial question frequently will be one of degree but, as Holmes remarked, most of the great questions of the law are matters of degree. Within broad limits, the church authority having the right to determine church law will have constitutional protection, even if derivative, for its determinations and adjudications. But the scope of this protection will not be unlimited, and the nature of the protection will be centered on the individual members of the church.

After all, the individual members are the important factors. The experiences of the past quarter-century vividly demonstrate the important role that voluntary groups play in preserving individual liberties. The right to join organizations to defend one's substantive rights has been recognized to be of the highest importance in protecting those rights. The analyses of the pluralists, in bringing out the benefits to the individual of group activities and in demonstrating the need for ensuring that groups remain voluntary and free from state coercion, have proved valuable. In a free society, social propensities are not well understood by classing them as antithetical to the private life of the individual. This is so because, as far as the state permits (and in a free society this must be considerable) each man may partake of the social as an extension of the individual. The freedom to quit, the zest for introverson, is as much a part of these rights as their opposites. Group thinking may create ten tyrants in place of one. This is the great danger of pluralism from the libertarian point of view. Laski's little states may create only a proliferation of coercive powers, more sovereigns to subject the individual. Nor is this limited to Laski. It is unfortunately implicit in some of Figgis' ideas, for Figgis had as one of his purposes the restoration of the church to a previously held position of authority in society. Figgis believed that the agitation for abolition of all state support for church education was a step against his pluralistic principles. The case of *Illinois ex rel. McCollum v. Board of Education*,[115] where it was held that the utilization of the public school system to enable sectarian authorities to give religious instruction to public school students in public school buildings was unconstitutional, would have seemed to Figgis to have been a deprivation of ecclesiastical liberty. This was a particular example of a spirit in his works unfriendly to the rights of individuals independent of groups. Figgis wrote in *Churches in the Modern State*:

> Persecution is normally condemned on the ground that it tampers with the individual conscience. But the very conception of personality we were developing in the last lecture seems to militate

115. 333 U.S. 203 (1948).

> against this view. If the individual only comes to himself as a part of society, his conscience is always partially social. Why should not the society which has made him what he is assert an authority in the last resort coercive against him?[116]

That way Mussolini lies. We should be careful to take our pluralism in small doses.

These small doses do create a greater constitutional restraint on the actions of the states, if the interpretation of the *Kedroff* opinion presented in these pages is sound. If so, what will be the effect on Missouri law? It seems clear that, under any but the narrow view of *Kedroff* adopted by the New York Court of Appeals,[117] *Watson v. Garvin*[118] and *Boyles v. Roberts*[119] are no longer binding authority. The assumption of authority by the civil courts to declare what the powers of the church are on matters in which church law is relevant is almost as obsolete as the analogous power of federal courts to decide state law under *Swift v. Tyson.* In the dispute over concepts of jurisdiction which the two *Watson* cases[120] featured, it is submitted that the concept which thinks of the church's jurisdiction as primary and the state's jurisdiction as largely derivative has prevailed. This has not really been contested in Missouri since *Hayes v. Manning,*[121] and the results have been satisfactory to most people.

This modified pluralism, featuring a broad respect for group (and especially church) autonomy, is implicit in *Hayes v. Manning* and in *Watson v. Jones,* even if it is a matter of common law and not constitutional law. It might be claimed that the language of Judge Walker in the *Hayes* case, and that of Judge Woodson dissenting in *Boyles v. Roberts,* goes farther and adopts a truly pluralistic position. Indeed, the counsel for the pro-merger party in the *Hayes* case argued that "under our system of government, the church is a free institution, having all its powers in itself, and deriving them from no other body or government whatsoever."[122] Laski could scarcely have asserted more. But it is unlikely that either judge really went that far; it was of course sufficient for both to characterize the merger as an act not reviewable by civil courts.

The statement by counsel quoted above cannot be upheld as a true statement of the law when it is considered in the light of Missouri statutes and decisions, and it is extremely improbable that *Kedroff* has altered this situation. To take an obvious example, Sections 352.150 and 352.180 of the Missouri Revised Statutes of 1949 set forth

116. FIGGIS, *op. cit. supra* note 89, at 116.
117. See note 71 *supra.*
118. See note 5 *supra.*
119. See note 26 *supra.*
120. See text supported by notes 5-6 *supra.*
121. See note 33 *supra.*
122. 263 Mo. 1, 9 (1914).

rules to be followed in respect to merger and dissolution of churches. In the case of *Sosna v. Fishman*,[123] the St. Louis Court of Appeals held that the mere closing of the physical facilities of the church was not sufficient, in the absence of legal steps complying with the statute, to effect a valid dissolution of the religious organization. The provision of Section 352.180 requiring a vote of 75 per cent of the membership for dissolution does raise some problems in light of the *Kedroff* decision, but it is probable that general rules relating to the title to the property and general status of the church can be validly controlled by the state. These are the fringe areas of the intra-church problem, areas where internal affairs come close to becoming external as well, and rigid theories are inapplicable.

The issue of incorporation also poses these problems. The *Klix* case[124] decided that the form in which the title to property is held is not controlling, that the distinction between the corporate and unincorporated form does not make a difference. Yet it can be seen that inconveniences may arise because the title is in hands other than those actually having authority. A Catholic legal scholar, Joseph Dignan, has complained that in Missouri the traditional conception of the parish as a *persona moralis* was not sufficiently appreciated, and that it was necessary to maintain the title in the Archbishop in fee simple.[125] The *Klix* case might show that this was not necessary, but very likely desirable in order to avoid difficulty. However, the *Klix* case and the *Olcar* case[126] demonstrate that the civil courts will tend to uphold the Roman Catholic authority over the church regardless of the form in which the property is held. But, of course, special problems might arise, particularly in respect to cases where the trust element seems important.

The matter of trust interpretation always pervades these matters, and the capacity of courts to view intra-church disputes in the guise of trust enforcement is usually possible because of the widespread use of equitable interests as a substitute for incorporation. With the exception of *Marr v. Galbraith*,[127] Missouri law has moved toward the direction indicated in *Watson v. Jones*[128] and has limited trust interpretations to cases in which the grantor was clearly setting up a trust and not merely making a gift. It is hard to see how the United States Supreme Court could prevent a wider use of this device, although its very great enlargement to cover all conceivable questions might enable the federal courts to prevent such circumvention of the *Kedroff* case.

123. 154 S.W.2d 398 (Mo. App. 1941).
124. See note 36 *supra*.
125. DIGNAN, A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784-1932) 263 (1933).
126. See note 42 *supra*.
127. See note 55 *supra*.
128. See note 6 *supra*.

Today it seems that the Missouri law has reached a position which sensibly discourages civil decisions on most church matters, while maintaining some control in the outer periphery. The trust and property outlooks which reached their heights in Judge Graves' opinion in the *Boyles* case[129] have been discarded without federal pressure. Today, the dichotomy between property and nonproperty matters, although still repeated, is an empty formula; the decisions are made on other criteria. It is not generally profitable to view conflicts between church members concerning control of the church as a property dispute. It is not profitable conceptually, for the property is better thought of as going with the church and the issue as one of control and use, rather than ownership. It is not profitable practically, for unless one treats the matter as simply a property question, as Judge Graves and Justice Jackson did, the complications will destroy the initial premises. This issue is not confined to religious groups; the weakness of the contract theory of union funds has been indicated,[130] and Professor Chafee has discussed the disadvantage of recognizing vested rights in treasury money in various voluntary groups.[131]

Missouri courts have tended to uphold group autonomy in nonreligious organizations as well as religious, as the cases of *Brandenburger v. Jefferson Club Ass'n*[132] and *State ex rel. Cammann v. Tower Grove Turn Verein*[133] indicate. That state courts are not eager to assist a member expelled from a professional organization might be deduced from *State ex rel. Hyde v. Jackson City Medical Society.*[134] In short, Missouri does not tend to give religious groups any conspicuous superiority in immunity from state intervention in internal matters, but appears to follow a general policy of permitting wide areas of autonomy. A good example is the immunity against an action for defamation granted to church forums when they hear charges against members or ministers. This doctrine was established by the Missouri Supreme Court in *Landis v. Campbell.*[135] The court there stated:

> [P]ersons who join churches . . . voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof, subject themselves to the tribunals established by those bodies . . . and, if aggrieved by a decision against them, made in good faith by such judicatories, they must seek their redress within the organization. . . .[136]

129. See note 20 *supra.*
130. Note, 63 HARV. L. REV. 1413 (1950).
131. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 999 (1930).
132. 88 Mo. App. 148 (1901).
133. 206 S.W. 242 (Mo. App. 1918).
134. 295 Mo. 144, 243 S.W. 341 (1922).
135. 79 Mo. 433 (1883).
136. *Id.* at 439.

A famous reaffirmation of the immunity was made in *Warren v. Pulitzer Publishing Co.*[137] The immunity was extended to fraternal organizations in *Fisher v. Myers.*[138] This privilege to conduct proceedings with immunity from judicial interference is qualified, however, and not absolute. If the charges made before these tribunals are false and the proceedings were maliciously or falsely carried on to cover an intended scandal, they are not privileged and the maker is subject to a civil action for defamation.[139] This is surely reasonable, yet one must note that the civil courts are looking into statements made "within" the church, and it is somewhat doubtful that the right protected is a property right. Of course there is a right in good reputation, but it would seem that it is less of a property right than that of a clergyman to his job, and we have seen that civil courts do not endeavour to protect the latter.[140]

A more realistic and desirable way of approaching the question of civil intervention into intra-church affairs is to view it as dependent on the necessity of making a decision and on the need to preserve the rights of church members against extreme and totally unwarranted steps by those in control of the church. The clear example of the situation where a decision is necessary is the case where two parties come before the civil courts and each of them claims to be or to represent the body within the church with jurisdiction over the matter in dispute. A determination of which group has the authority is, of course, a prerequisite to the enforcement of the judgment of the church. It is not easy, of course, to determine what the criteria for jurisdiction should be in this area. If, under the church constitution or other governing rules, the membership has the final word regarding certain functions, does the determination of the membership, acting ultra vires, have binding force? If not, does this mean that the civil court must make its own findings regarding all the church organization law? The relevance of these issues to the problems that have faced Missouri courts in the last decade is obvious.

It is also possible, under the rubric of jurisdiction, to devise certain due process standards. It has been suggested in the *Washington University Law Quarterly* that,

> By analogy to the jurisdictional requirements of the civil courts, it can be said that the failure of a union to accord a member these opportunities [for fair procedure] results in the union's failure to perform the procedural prerequisites for it to obtain jurisdic-

137. 336 Mo. 184, 78 S.W.2d 404 (1934).
138. 339 Mo. 1196, 100 S.W.2d 551 (1936).
139. Landis v. Campbell, 79 Mo. 433, 440 (1883).
140. See note 41 *supra.*

> tion over the person of the member involved, even though the tribunal may have jurisdiction over the subject matter of the controversy.[141]

This is probably more appropriate in consideration of union decisions, where the organization frequently exerts a high degree of control over the members' livelihoods, than in ecclesiastical questions. Such a wide power to intervene in church affairs would have the danger of reinstating a great amount of state intervention under the guise of determining jurisdiction. But it must be recognized that there are certain situations in which a very strong case can be made for the state courts to ignore the final church authority and yet retain a philosophy of church autonomy. A case of bribery or intimidation poses this case most clearly. A more cogent example would come up in a situation where a group of Moslems join an Episcopalian church under false colors and then vote to convert the church to Islam. This is what Commissioner Wolfe was considering in *Mertz v. Schaeffer*[142] when he stated that the court would not permit a group to change the beliefs of a church from one religion to another. His language perhaps permitted too wide a scope for civil court investigation of such doctrinal matters in a congregational church and seemed to preclude any investigation at all in a synodic church if the synod is won over. Great care should be taken by the civil courts to avoid deciding these religious issues, and therefore the degree of permissible change even by assemblies dominated by recent members should be broad; but at some point it would seem suitable for a check to be placed by civil courts upon the wrenching of a church from its traditional moorings by "temporary" majorities.

This check comes down to a matter of degree and seems to depend upon the beliefs and perhaps even the instincts of judges who deal with problems as they arise. Its limitation rests in the vitality of the philosophy of church freedom espoused in *Hayes v. Manning*.[143] A number of the recent cases have been considered deviations from that philosophy, "explicable as inadvertent departures from the principle to which they claim to adhere."[144] It has been suggested that these cases—*Trett* and *Longmeyer* and *Murr*[145]—are harmonious and consistent with that spirit of church freedom. They should be considered to be within the exceptions which have just been outlined—exceptions not inconsistent, but complementary to the state policy definitely established in Missouri by the *Hayes* case.

---

141. Note, 1954 WASH. U.L.Q. 440, 451.
142. See note 1 *supra*.
143. See note 33 *supra*.
144. Annot., 20 A.L.R.2d 421, 485 (1951).
145. See text at p. 82 *supra*.

Three generations of Missouri decisions have demonstrated a large area of consistent legal growth in an orderly fashion. This growth has not led to pluralism in any thoroughgoing meaning of the term. Churches are not treated as real persons in the eyes of the law, but the living elements of their nature have been in fact recognized. Religious groups are not considered as societies competing with the state, yet within their orbit it is true that they make a law of sorts, and that the law so made is respected in the tribunals of the state. This would probably not fully satisfy Figgis; it would certainly not satisfy Laski; but it is a compromise ably demonstrating the skills of Anglo-American law in reaching a tenable middle course. The Missouri law on intervention by civil courts into intra-church disputes has thus traveled along the *via media*, perhaps a little on the anti-intervention side of the road, and it is to be hoped that it will stay there.

CONTRIBUTORS TO THIS ISSUE

MASON LADD—Dean and Professor of Law, University of Iowa College of Law. A.B. 1920, LL.D. 1954, Grinnell College; J.D. 1923, University of Iowa; S.J.D. 1935, Harvard University. Colonel, J. A. G.D., U.S. Army. Member of the American Law Institute and adviser for the Model Code of Evidence. Editor, Cases & Materials on Evidence. Co-editor, Cases & Materials on Pleading & Procedure, Cases & Materials on Federal Jurisdiction and Procedure. Member of Committee on Professional Education of the American Council of Education. Commissioner, National Conference on Uniform State Laws. Honorary Life Member, Montana State Bar. Member, Iowa Bar Association, American Bar Association, and J.A.G. Association.

DANIEL R. MANDELKER—Assistant Professor of Law, Indiana University, Indianapolis Division. B.A. 1947, LL.B. 1949, University of Wisconsin. Assistant Professor of Law, Drake University, 1949-52. Ford Foundation Fellow in Residence, Yale Law School, 1951-52. Attorney-Adviser, United States Housing and Home Finance Agency, Office of the Administrator, Washington, D. C., 1952-53.

PIERRE R. LOISEAUX—Associate Professor of Law, Emory University, Atlanta, Ga. Attended University of New Hampshire; LL.B. 1950, Boston University; LL.M. 1951, New York University. Assistant Professor of Law, University of Arkansas, 1951-53. Admitted to practice, Massachusetts, 1950.

JOSEPH O. LOSOS—A.B. 1952, LL.B. 1955, Harvard University. Member of Missouri Bar Association.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1956 | February 1956 | Number 1

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published in February, April, June, and December at
Washington University, St. Louis, Mo.

Subscription Price $4.00; Per Current Copy $1.25. A subscriber desiring to discontinue his subscription should send notice to that effect. In the absence of such notice, the subscription will be continued.